

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

RECONTRUST COMPANY N.A.,

Defendant.

NO. 2:11-cv-01460-JLR

STATE OF WASHINGTON'S
MOTION TO REMAND

NOTE ON MOTION CALENDAR:
NOVEMBER 18, 2011

I. INTRODUCTION

The State of Washington filed suit against foreclosure trustee ReconTrust Company, N.A., (ReconTrust) in King County Superior Court for violations of the Washington Consumer Protection Act (CPA). Wash. Rev. Code 19.86. The suit seeks enforcement of both the CPA and the Washington Deed of Trust Act, Wash. Rev. Code 19.64, which sets forth the requirements for nonjudicial foreclosures in Washington. There are no federal claims or remedies asserted in the complaint. ReconTrust removed this matter claiming federal jurisdiction under provisions that govern class actions and mass actions in the Class Action Fairness Act of 2005, Pub.L. No. 109-2, 119 Stat. 4, (CAFA). 28 U.S.C. § 1332 (d)(2) and (d)(11). ReconTrust's contention contradicts both the plain language and the intent of CAFA, as the Ninth Circuit recently affirmed in *Washington v. Chimei Innolux Corp.*, No.

11-16862, --- F.3d ---, 2011 WL 4543086 (9th Cir. Oct. 3, 2011) (slip opinion attached).¹ *Chimei*, which was decided after ReconTrust removed this action, affirmed “that *parens patriae* suits filed by state Attorneys General may not be removed to federal court because the suits are not ‘class actions’ within the plain meaning of CAFA.” *Id.* at 5 (slip op.). Thus, binding precedent prohibits federal jurisdiction under CAFA’s class action provisions. ReconTrust also attempts to define this case as a “mass action” under CAFA, but this claim fails for the same reasons expressed in *Chimei*. A state Attorney General enforcement action is a *parens patriae* action and there are no grounds for piercing the pleading to find other ‘real parties in interest’ that would qualify this matter as a mass action.

II. ARGUMENT

The State moves to remand pursuant to 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded.”) Courts presume federal jurisdiction is not available and this presumption is unchanged by the addition of class and mass action jurisdiction under CAFA. *Chimei*, slip op. at 6-7. The presumption against removal is especially strong where a state is pursuing an enforcement action under state law in its own court. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21, n. 22, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983) (“considerations of comity make us reluctant to snatch cases ... unless some clear rule demands it”); *See, West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.* 646 F.3d 169, 178 (4th Cir. 2011) (“[A] federal court should be most reluctant to compel ... removal.”).

A. This Suit is not a Class Action Under CAFA.

CAFA defines a class action as “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule.” 28 U.S.C. § 1332(d)(1)(B). This action was not filed under federal rule 23; it was filed in King County with no class allegations under federal law or a state equivalent. The State is not a member of a class and

¹ All slip opinions of unpublished district court orders are included in an appendix to this motion.

its claims and interests are different than those of private class members. Thus, the State's consumer protection suit and its role as the plaintiff do not have "the fundamental attributes of a consumer class action" – commonality, numerosity and typicality. *Chimei*, slip op. at 9. (*citations omitted*).

This matter is a *parens patriae* action under the CPA to require ReconTrust to cease unfair and deceptive practices and to comply with foreclosure laws. *Compl.* ¶¶ 6.1 – 7.6. The CPA authorizes the State Attorney General to sue "in the name of the state, or as *parens patriae* on behalf of persons residing in the state." Wash. Rev. Code § 19.86.080 (2007). The CPA's purpose is "to protect the public and foster fair and honest competition." Wash. Rev. Code § 19.86.920 (1985). The State has alleged that ReconTrust: conducted thousands of unlawful foreclosures in Washington, *Compl.* ¶¶ 4.1, 4.3; competes with other trustees lawfully engaged in similar practices, ¶ 5.2; publicly misrepresented material facts, ¶ 5.3(a) and 5.14; and, has both harmed consumers and clouded title to real property in the State. ¶ 5.3(b). These are the types of claims the Ninth Circuit has concluded are *parens patriae* claims. *Chimei*, slip op. at 7 (finding that the action was brought in *parens patriae* because it alleged injury to a substantial segment of the State's population and included interests apart from the interests of particular private parties). This suit affects thousands of homeowners subject to ReconTrust foreclosures, potential purchasers of those homes facing clouded titles, and the marketplace for trustees who compete using lawful means. *Compl.* ¶¶ 5.3, 5.7, 5.12, 7.3; *see also West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d at 172 (a claim for unfair or deceptive trade practices under a state consumer protection law is "a classic *parens patriae* action intended to vindicate the State's quasi-sovereign interests and the individual interests of its citizens.")(*quotations omitted*).

B. This Suit is not a Mass Action Under CAFA.

While *Chimei* directly puts to rest ReconTrust's argument that this matter is a class action, it also denies ReconTrust's theory that this matter is a mass action under CAFA. *Not*.

1 *Removal at 2-8.*² Under CAFA a mass action is: “any civil action ... in which monetary
 2 relief claims of 100 or more persons are proposed to be tried jointly.” 28 USC
 3 § 1332(d)(11)(B)(i). Here, the only Plaintiff is the State of Washington. No other plaintiffs
 4 are named and no claims are asserted for unnamed plaintiffs. ReconTrust asks the Court to
 5 pierce the complaint to get to the “real parties in interest.” However, as established by
 6 *Chimei*, in CPA enforcement actions the only real party in interest is the State because it is
 7 acting as *parens patriae*. *Chimei*, slip op. at 7.

8 The ‘100 or more persons’ requirements refers to the actual plaintiffs asserting their
 9 claims, not to a defendant’s characterization of who the interested parties should be. In
 10 *Tonah v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009) the plaintiffs filed seven separate
 11 lawsuits, each with fewer than 100 named plaintiffs. Defendants removed the suits claiming
 12 the plaintiffs had “strategically” broken one suit into seven. *Id.* at 951. The Ninth Circuit
 13 denied CAFA jurisdiction because mass actions are determined based on the parties actually
 14 before the court at the time of removal. *Tonah* points to CAFA’s legislative history to show
 15 that Congress was referring to the actual plaintiffs when defining a mass action. *Id.* at 954-55
 16 (“Under subsection 1332(d)(11), any civil action *in which 100 or more named parties* seek to
 17 try their claims for monetary relief together will be treated as a class action for jurisdictional
 18 purposes.”) (*emphasis added*) (*citing* S.Rep. No. 109-14, at 46, *reprinted in* 2005
 19 U.S.C.C.A.N. 3, 43-44); *see also Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752-54
 20 (D. N.J. 2005) (reviewing congressional statements exempting AG lawsuits from CAFA).
 21 *Tonah* is a direct rejection of a defendant’s attempt to create federal jurisdiction by claiming
 22 that the true parties are persons other than those named on the face of the complaint. *See*,

23
 24 ² The Defendant had argued mass action at trial level in *Chimei* but dropped that theory during oral
 25 argument at the Ninth Circuit. *California v. AU Optonics Corporation et al. (a/k/a In Re: TFT-LCD (Flat Panel)*
 26 *Antitrust Litigation*), No. 3:10-cv-05212-SI, 2011 WL 560593, 8 (N.D. Cal. Feb. 15, 2011 (heard in the N.D.
 Calif. as part of Multi-District Litigation); *accord, Arizona ex rel. Horne v. Countrywide Fin. Corp.*, No. 11-cv-
 131, 2011 WL 995963 (D. Ariz. Mar. 21, 2011); *South Carolina v. AU Optonics*, No. 3:11-cv-00731, 2011 WL
 4344079 (D. S.C. Sept. 14 2011); *Illinois v. AU Optonics*, No. 10-cv-5720, -- F Supp.2d --, 2011 WL 2214034
 (N.D. Ill, June 6, 2011).

1 *California v. AU Optronics Corporation et al. (a/k/a In Re: TFT-LCD (Flat Panel) Antitrust*
 2 *Litigation*), No. 3:10-cv-05212-SI, 2011 WL 560593, 8 (N.D. Cal. Feb. 15, 2011) slip op. at
 3 3-7; *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.*, 686 F. Supp. 2d 942 (E.D.
 4 Mo.2010).³

5 **C. The State, as *Parens Patriae*, is the Only Real Party in Interest to This Litigation**

6 ReconTrust argues that the real parties in interest are the borrowers who have
 7 ReconTrust as a trustee because they may receive relief from this litigation. Not. Removal
 8 at 3. ReconTrust does not contend that the homeowners have any control over the suit or a
 9 right to any relief. ReconTrust does not discuss why homeowners would be the only real
 10 parties in interest when there are other persons who will also directly benefit from a
 11 successful outcome – e.g. competing trustees who incur the expenses of complying with the
 12 physical presence requirements, lenders who pay ReconTrust to perform legally compliant
 13 foreclosures, purchasers who will obtain clean title at sale and title insurers who will not have
 14 to defend clouded title.

15 Instead, ReconTrust relies on *Louisiana ex rel. Caldwell v Allstate Ins. Co.*, 536 F.3d
 16 418 (5th Cir. 2008) which found a state action seeking treble damages to be a mass action. It
 17 is worth noting that the Ninth Circuit in *Chimei* only mentions *Caldwell* in a footnote,
 18 probably because it assumed without question that the Attorney General suits were *parens*
 19 *patriae* actions and therefore it did not need to engage in any piercing of the pleading to find
 20 unnamed persons as the real party in interest. *Chimei*, slip op. at 4.

21 According to ReconTrust, *Caldwell* pierced the pleadings because “the court focused
 22 on the attorney general’s claim for damages on behalf of particular consumers.” Not.
 23 Removal at 4. Given this holding, *Caldwell* does not apply. The State does not seek

24 ³ See also, *California Public Employees Retirement System v. Moody's Corp.* No. 09-cv-3628, 2009 WL
 25 3809816 (N.D. Cal., 2009) slip op. 10; *Kitazato v. Black Diamond Hospitality Investments, LLC*, No. 09-cv-0271,
 26 2009 WL 3209298 (D. Haw. 2009) slip op. 8-9; *State v. AU Optronics* No. 10-cv-5720, --- F. Supp. 2d ---, 2011
 WL 2214034 (N.D. Ill., June 6, 2011) slip op. 3-15; *Arizona ex rel. Horne v. Countrywide Fin. Corp.*, No. 11-cv-
 131, 2011 WL 995963 (D. Ariz. Mar. 21, 2011) slip op. 3-6.

1 damages here. It seeks penalties, relief that is not available to private parties. Wash. Rev.
 2 Code § 19.86.140 (1983); *Stigall v. Courtesy Chevrolet-Pontiac, Inc.* 15 Wn. App. 739, 551
 3 P.2d 763 (1976). The Attorney General is not authorized to seek damages when enforcing
 4 the CPA for unfair and deceptive practices. Wash. Rev. Code § 19.86.080 (2007)
 5 (authorizing injunctive relief, restitution and costs)⁴ *Caldwell* suggests that if there are no
 6 damage claims, then the State would be the only real party in interest. *Caldwell* 536 F.3d at
 7 429-30. Thus, under *Caldwell* the State is the only real party in interest here. *Caldwell* is also
 8 distinguishable because it relies on a state law that explicitly says policyholders are the "real
 9 parties in interest." *Id.* at 429 (citing La. Rev. Stat. Ann. § 51:137). *Caldwell* suggests in
 10 footnotes that language, similar to Washington's CPA, authorizing the state to proceed "in
 11 the name of the state, or as parens patriae" creates a statutory *parens patriae* right of action
 12 which would overcome claims that the State is not the real party in interest. *Caldwell* at 427,
 13 n.5, 430, n.10; see Wash. Rev. Code § 19.86.080.⁵

14 **D. The State Is The Real Party Because It Is Exercising Sovereign And Quasi-**
 15 **Sovereign Powers.**

16 ReconTrust's theory that other parties are also 'real parties in interest' contradicts
 17 over 100 years of precedent for determining citizenship of a party for diversity purposes.
 18 *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 6 L. Ed. 204 (1824) (jurisdiction
 19 depends on the party named in the record.); See Wright & Miller, Federal Practice &
 20 Procedure § 1556 (3d ed.) (citing *Atchison, T. & S.F. Ry. Co. v. Phillips*, 176 F. 663 (9th

21 _____
 22 ⁴*State v. State Credit Ass'n*, 33 Wn. App. 617, 621, 657 P.2d 327 (1983) ("The relief available in a
 23 consumer protection action brought by the State is entirely equitable."); *State v. Ralph Williams' N.W. Chrysler*
 24 *Plymouth, Inc.*, 82 Wn.2d 265, 277, 510 P.2d 233 (1973) (Restitution is incidental to injunctive relief.)

25 ⁵ The *Caldwell* decision has been criticized or distinguished by several courts. *Missouri ex rel. Koster v.*
 26 *Portfolio Recovery Associates, Inc.*, 686 F. Supp. 2d 942, 945 -946 (E.D. Mo. 2010); *California v. AU Optronics*
Corporation et al. (a/k/a In Re: TFT-LCD (Flat Panel) Antitrust Litigation), No. 3:10-cv-05212-SI, 2011 WL
 560593, 8 (N.D. Ca. Feb. 15, 2011) slip op. at 4-5; *Virginia v. SupportKids Servs., Inc.*, No. 3:10-cv-73, 2010 WL
 1381420, at *2 n.2 (E.D. Va. Mar. 30, 2010) slip op. at 5 n.2; *State v. AU Optronics* No. 10-cv-5720 --- F Supp.
 2d ---, 2011 WL 2214034 (N.D. Ill. June 6, 2011) slip op. at 10-11; *Illinois v. SDS West Corp.*, 640 F. Supp. 2d
 1047, 1052 (C.D. Ill. 2009); *Colorado Civil Rights Com'n v. Wells Fargo Bank and Co.*, No. 10-CV-02427, 2011
 WL 2610205, *3 (D.Colo. Jul 01, 2011) slip op. at 10.

1 Cir. 1910)) (A party is an interested party for purposes of diversity jurisdiction when it has
 2 some control over the litigation.) The State is the real party here because it sues to vindicate
 3 sovereign and quasi-sovereign interests in securing an honest marketplace and the economic
 4 well-being of its citizens. *Alfred E. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607,
 5 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982). *Snapp* found that although the subject of the suit
 6 was a small subset of Puerto Rico's population, the Commonwealth still had standing based
 7 on its sovereign and quasi-sovereign interests under the *parens patriae* doctrine. Sovereign
 8 interests include enforcing its civil code. *Snapp* at 601. Here, the State is enforcing two
 9 sections of its civil code, the Consumer Protection Act, Wash. Rev. Code 19.86, and the
 10 Deed of Trust Act, Wash. Rev. Code 61.24. *Compl.* ¶¶ 1.2, 3.1, 5.3, 5.7, 6.1 and 6.2. Hence,
 11 the State is the real party exercising its sovereign interests.

12 *Snapp* holds that a state's quasi-sovereign interests include the economic well-being
 13 of its citizens and that courts should look to the goals of the State's action when determining
 14 the real party in interest. *Snapp* at 607-09, 612. Here, the State is enforcing foreclosure
 15 procedures created by the legislature to create a fair and efficient nonjudicial foreclosure
 16 process. *See Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985) (explaining purpose
 17 of the Deed of Trust Act). This action holds ReconTrust to the particulars of the foreclosure
 18 process so that no trustee gains an unfair advantage, no homeowner is denied an opportunity
 19 to stop a wrongful foreclosure, and no homes are sold with clouded titles. *Id.* at 387. *See*
 20 *Illinois v. SDS West Corp.*, 640 F. Supp. 2d 1047, 1050 (C.D. Ill. 2009) ("securing an honest
 21 marketplace" is "a well established quasi-sovereign interest").

22 A Nevada district court disregarded *Snapp's* holistic analysis by breaking up the
 23 States' enforcement action into subsets based on what relief is sought. *Nevada v Bank of*
 24 *America*, No. 3:11-cv-0135, 2011 WL 2633641 (D. Nev. July 5, 2011) slip op. at 3 (*appeal*
 25 *pending, but effectively overruled by Chimei*). The *Nevada* decision finds that because some
 26 of the State's claims ask for damages, it was not acting in *parens patriae* powers, but instead

1 on behalf of individual homeowners.⁶ The *Nevada* court felt compelled by *Department of*
 2 *Fair Employment & Housing v. Lucent Technologies*, 642 F.3d 728 (9th Cir. 2011) to find
 3 that the State was not the real party in interest. *Nevada v Bank of America*, slip op. at 6.
 4 *Lucent* does not compel such a finding, in particular because it is so legally and factually
 5 distinct from most state enforcement cases. California sought to recover on behalf of one
 6 person, it called that person the “Real Party,” and it sought that person’s actual damages.
 7 *Lucent* at 740, n.8. The statute in *Lucent* explicitly states: “the person claiming to be
 8 aggrieved shall be the real party in interest.” Cal. Gov’t Code § 12965(c)(2). Unsurprisingly,
 9 the Court found that this employee, who is the sole subject of the litigation, was the real party
 10 in interest in the suit. The present suit concerns thousands of persons and does not seek
 11 damages.⁷

12 The Ninth Circuit has twice failed to extend *Lucent* to enforcement actions involving
 13 more than one plaintiff. In *Chimei*, the *Lucent* decision was not mentioned despite *Lucent*
 14 preceding *Chimei* by five months, and extensive briefing of *Lucent* by the parties. Also,
 15 when ReconTrust and its co-defendants appealed an Arizona remand in a similar case the
 16 Ninth Circuit denied the appeal without mentioning the *Lucent* opinion, despite its issuance
 17 two months prior and briefing of *Lucent* by the parties. *Ariz. ex rel. Horne v. Countrywide*
 18 *Fin. Corp.*, No. 11-80086 (9th Cir. June 29, 2011) (*attached*). (*reconsideration pending*). The
 19 Ninth Circuit’s denial cites only *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096 (9th
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21 ⁶ This analysis contrasts with most cases where the court looks at the case as a whole, and where the fact
 22 that some private consumers may benefit does not make the State a nominal party or the private consumers an
 23 actual party. See, *In re New York* 256 U.S. 490, 500, 41 S. Ct. 588, 65 L.Ed. 1057 (1921); *New York ex rel.*
 24 *Abrams v General Motors Corp.*, 547 F. Supp. 703, 705- 707 (S.D. NY 1982); *Illinois v. SDS West Corp.*, 640
 25 F. Supp. 2d 1047, 1052-53 (C.D. Ill. 2009); *Mississippi ex rel. Hood v. Microsoft Corp.*, 428 F. Supp. 2d 537,
 26 545-46 (S.D. Miss. 2006); *Wisconsin v. Abbott Labs.*, 341 F. Supp. 2d 1057, 1061-62 (W.D. Wis. 2004);
Mississippi ex rel. Moore v. Abbott Labs, 900 F. Supp. 26, 31-32 (S.D. Miss. 1995); *West Virginia v. Morgan &*
Stanley Co. Inc., 747 F. Supp. 332, 339 (S.D. W.Va. 1990); see also, *Ariz. Ex rel. Horne v. Countrywide Fin.*
Corp., No. 11-cv-0131, 2011 WL 995963 (D. Ariz. March 21, 2011); *California v. Universal Syndications, Inc.*,
 No. C 09-1186, 2009 WL 1689651 (N.D. Cal. June 16, 2009).

⁷ See also, *Department of Fair Employment and Housing v. Lucent Technologies, Inc.* 642 F.3d 728, 750
 (9th Cir. 2011) (*Ikuta dissenting*) (Pointing out that previous Supreme Court and Ninth Circuit precedent
 considered the State to be the real party in interest even in cases regarding one person.)

1 Cir. 2010) (*per curiam*), which stands for the proposition that a circuit court should grant a
 2 CAFA appeal only when there is an “important CAFA-related question” that is “at least
 3 fairly debatable.” *Id.* at 1100. The Ninth Circuit’s failure to grant appeal is some indication
 4 that the trial court’s remand is not debatable, and certainly means that *Lucent* is not
 5 dispositive on the issue of real parties in interest. Thus, two Ninth Circuit rulings have not
 6 applied *Lucent*’s real party in interest analysis to Attorney General enforcement actions
 7 involving more than one person on whose behalf the Attorney General seeks relief. Instead,
 8 *Chimei* relies on the previous *Snapp* standard finding that the State is the real party asserting
 9 its *parens patriae* interest. *Chimei* at 7.

10 State law firmly supports the principle that the State is the real party in interest here.⁸
 11 In *Herrmann v. Cissna*, 82 Wn.2d 1, 507 P.2d 144 (1973) the Court held that the suit was for
 12 the benefit of the State, even though any proceeds would inure to a private company,
 13 because the statute the State was enforcing, Wash. Rev. Code Ch. 4.16.160, was for the
 14 benefit of the public. *Id.* at 147. Here, the state brings suit under the CPA, whose purpose is
 15 to “protect the public and foster fair and honest competition.” Wash. Rev. Code § 19.86.920
 16 (1985). As in *Herrmann*, the actions taken by the State may benefit private parties,
 17 particularly if restitution is awarded, but they are taken primarily in the public interest.
 18 *Herrmann*, 507 P.2d at 147. The Attorney General seeks restitution to protect the public.
 19 Any relief provided to private individuals is only “incidental to and in aid of the relief asked
 20 on behalf of the public.” *Seaboard v. Ralph Williams' North West Chrysler Plymouth, Inc.*,
 21 81 Wn.2d 740, 746, 504 P.2d 1139, 1143 (1973). Any penalties awarded go to the State, not
 22 private individuals. Wash. Rev. Code § 43.10.030(11) (2009); *Stigall v. Courtesy-Chevrolet*,
 23 15 Wn. App. 739, 551 P.2d 763 (1976).

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 26 ⁸ Real party in interest analysis is guided by state law. *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 738 (9th Cir. 2011).

E. If This Matter Met CAFA's Mass Action Definition it Would Also Meet CAFA's Exemptions to that Definition.

CAFA contains two relevant exemptions to mass actions. The first exempts suits where all the claims stem from acts in the same state as where the suit is filed. 28 U.S.C. § 1332(11)(B)(ii)(1). Here, all claims stem from ReconTrust's foreclosures in the State of Washington and all the injuries are to Washington residents, foreclosure trustees competing in Washington, purchasers at Washington foreclosure sales and the marketplace as a whole. The second exemption states that the term 'mass action' shall not include any civil action in which "all of the claims in the action are asserted on behalf of the general public ... pursuant to a State statute specifically authorizing such action." 28 U.S.C. § 1332(11)(B)(ii)(3). As shown above, all the State's claims are asserted as *parens patriae* and the CPA is a state statute authorizing this suit on behalf of its citizens. Wash. Rev. Code § 19.86.080 (2007). The CPA's purpose is "to protect the public and foster fair and honest competition." Wash. Rev. Code § 19.86.020 (1961).

F. ReconTrust Fails to Establish the Amount in Controversy

ReconTrust presents no evidence regarding the \$75,000 jurisdictional minimum required by CAFA for mass actions. 28 U.S.C. § 1332(d)(11)(B)(i); *Gaus v. Miles*, 980 F.2d 564, 566-67 (9th Cir. 1992) (if plaintiff does not specify damages then defendant must prove the jurisdictional amount). ReconTrust presents no evidence that any one claim exceeds \$75,000, let alone that 100 or more claims exceed that amount. It also wrongly states that only one person's claim must exceed \$75,000 to meet the "mass action" requirements. Not Removal at 6. CAFA actually requires that each of the 100 or more qualifying plaintiff's must have damages in excess of \$75,000. 28 U.S.C. § 1332(d)(11)(B)(i); *see also*, *Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 292-93 (S.D. NY 2009) ("Mass action requires that any individual with less than \$75,000 will have to be remanded." *Id.*) If fewer than 100 plaintiffs have damages over \$75,000, then there would be no mass action because

1 not enough people are asserting their claims to meet the mass action threshold. 28 U.S.C. §
 2 1332(d)(11)(B)(i). As it stands, the Court does not know whether it actually has subject
 3 matter jurisdiction and any judgment could be re-opened by a person claiming their damages
 4 were under \$75,000.⁹

5 **G. Federalizing CPA Enforcement Actions Denies the State Court's Statutory Role in**
 6 **Defining Unfair and Deceptive Practices Under the CPA.**

7 The CPA, more than most statutes, is reliant on judicial decisions to achieve its
 8 purpose. The CPA's language is purposely comprehensive. It bans "unfair methods of
 9 competition and unfair or deceptive acts or practices." Wash. Rev. Code § 19.86.020 (1961).
 10 The legislature did not specifically define prohibited acts because "[t]here is no limit to
 11 human inventiveness in this field." *Ivan's Tire Service v. Goodyear Tire*, 10 Wn. App. 110,
 12 122, 517 P.2d 229 (1973) *aff'd*, 86 Wn.2d 513 (1976). Therefore, the process of "defining
 13 and proclaiming of the bounds of [the CPA's] terms falls upon the courts" on a case-by-case
 14 basis. *Id.* at 123. Federal courts prefer not to create new state law. Where a state statute must
 15 be interpreted and the position of the state court is unclear, federal courts should certify the
 16 question or otherwise defer to state courts. *Parents Involved in Community Schools v. Seattle*
 17 *School Distr. No. 1*, 294 F.3d 1085, 1086 (9th Cir. 2002) ("[E]ven when we find the plain
 18 language of state law dispositive ... we have an obligation to consider whether novel state-
 19 law questions should be certified—and we have been admonished in the past for failing to do
 20 so."); *Peck v AT&T Mobility*, 632 F.3d 1123, 1125 (9th Cir. 2011); *Minnick v Clearwire*, 636
 21 F.3d 534, 536-7 (9th Cir. 2011). There is therefore no reason for a court to pierce a CPA
 22 pleading so that it might decide a state law issue.

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 26 ⁹ *Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 736 (9th Cir. 2011) ("if, at the end of
 the day and case, a jurisdictional defect remains uncured, the judgment must be vacated.") (citing *Caterpillar Inc.*
v. Lewis, 519 U.S. 61, 76-77, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996)).

III. CONCLUSION

The jurisdictional prerequisites under CAFA are not satisfied here. This case lacks minimal diversity because the State is the only real party in interest and is not a citizen for purposes of diversity.¹⁰ Furthermore, the State's lawsuit is a *parens patriae* action and not a class action or mass action as those terms are defined under CAFA. Accordingly, the Court lacks subject matter jurisdiction over this matter, and it must be remanded to State Court.

DATED this 2nd day of November, 2011.

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¹⁰ The State is not considered a "person" for purposes of general diversity jurisdiction. *Moor v. Alameda County*, 411 U.S. 693, 717, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973) (citing *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487, 15 S. Ct. 192, 39 L. Ed. 231 (1894)).